Petition

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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RONALD SINE AND LARRY DANNER,
Petitioners

vs.

Mitchell Transport, Inc.
Respondent

* * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

HARRY GOLDMAN, JR.
RICHARD P. NEUWORTH
1123 Munsey Building
Calvert and Fayette Sts.
Baltimore, Maryland 21202
301-837-4222
Counsel for the
Petitioners

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RONALD SINE AND LARRY DANNER,
Petitioners

Vs.

MITCHELL TRANSPORT, INC.
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PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Ronald Sine and Larry Danner respectfully pray that a Writ of Certiorari issue to review that Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED FOR REVIEW

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1. Should the limitations period for bringing Vaca v. Sipes fair representation suits be borrowed from the National Labor Relations Act or United States Arbitration Act's limitation periods rather than State statutes for vacating arbitration awards?

2. Assuming Arguendo, that Federal Statutes are not the appropriate limitations period for bringing fair representation suits, should this Court's approval of the New York statute concerning vacation of awards in United Parcel Service v. Mitchell be used in all fair representation suits in all States?

PARTIES APPEARING
BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Petitioners, Ronald Sine and Larry Danner were the plaintiffs before the United States District Court for the District of Maryland and appellants before the Court of Appeals for the Fourth Circuit.

Mitchell Transport, Inc., was one of the defendants in the District Court. The other defendants were Local 992, International Brotherhood of Teamsters, Eastern Conference of Teamsters.

On appeal before the Circuit Court defendant employer, defendant Union and Conference were appellees.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit at 644 F2d 997 (1981) is re-reported and published. However, Judgment was not entered until May 12, 1981, when a request for a rehearing was denied. The opinions are in the Appendix (beginning at Page 50).

The initial Judgment rendered in the United States District Court was entered on August 28, 1979, pursuant to an opinion by the Honorable Joseph H. Young, District Judge. The opinion was unreported and unpublished and appears in the Appendix at Page 90.

JURISDICTION

This Court's Jurisdiction is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

Annotated Code of Maryland, Courts and Judicial Proceedings Article:

§ 3-202. Jurisdiction.

An agreement providing for arbitration under the law of the State confers jurisdiction on a court to enforce the agreement and enter judgment on an arbitration award (An. Code 1957, art. 7, § 16; 1973, 1st Sp. Sess., Ch. 2, § 1.)

Annotated Code of Maryland, Courts and Judicial Proceedings Article:

§ 3-206. Validity of arbitration agreements; agreements between employers and employees.

(a) Validity. - A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract.

(b) Agreement between employers and employees. - This subtitle does not apply to an arbitration agreement between employers and employees or between their respective representatives unless it is expressly provided in the agreement that this subtitle shall apply (An. Code 1957, art. 7 § 1; 1973, 1st Sp. Sess., Ch. 2 § 1.)

Annotated Code of Maryland,

Courts and Judicial Proceedings

Article:

§ 3-224. Vacating Award.

(a) Petition. - (1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

(2) If a petition alleges corruption, fraud, or other undue means it shall be filed within 30 days after the grounds become known or should have been known to the petitioner.

United States Codes, Title Nine:

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the pur-

poses of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

July 30, 1947, c. 392, 61 Stat. 673.

United States Code, Title 29, § 160(b). Whenever it is charged that any person has engaged in or is engaged in any such unfair labor practice, the Board, or any agent or agency designed by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and con-

taining a notice of hearing before the Board of a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: PROVIDED, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such

complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an aswer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in

the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

United States Code, Title 29, § 185. Suits by and against labor organizations:

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV:

[Citizenship Rights Not to be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, in compliance with the United States Court of Appeals for the Fourth Circuit's decision, in Howard v. Aluminum Workers, 589 F2d 771 (1978) as well as Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) and The U. S. Arbitration Act, 9 USC § 12, filed this action eighty-seven days after an adverse arbitration award was received, on August 24, 1978, denying claims for back pay arising out of a seniority dispute. Petitioners sued Mitchell Transport, Inc., the Eastern Conference of Teamsters, and Local 992 of the International Brotherhood of Teamsters contending the

employer and local union violated Section 301 of the Labor Management Relations Act of 1947 as amended, 29 USC 185, by violating the duty of fair representation prior to and at the arbitration hearing as well as the collective bargaining agreement then in force. Sine and Danner were seeking back pay because they had been awarded company seniority as the result of a jury verdict on June 6, 1975 and affirmance by the United States Court of Appeals for the Fourth Circuit. (See Appendix 90,76-1201, 76-1202) The findings of the Appellate Court were that Sine and Danner were entitled to company seniority and

back pay damages (Appendix 50). The Fourth Circuit also held a letter signed by appellants in 1971, which revoked their right to company seniority, was null and void. (Appendix 50).

The arbitrator ignoring the jury verdict and Fourth Circuit's decision held the letter was valid and denied petitioners' claims for back pay. Petitioners then brought suit in the United States District Court for Maryland on November 20, 1978, and moved for partial summary judgment against Mitchell under the doctrine of res judicata. Defendants, Local 992 and Mitchell also moved for summary judgment which was granted in favor of both defendants. The Fourth Circuit vacated summary judgment

in favor of Local 992 because the Lower Court's findings were phrased in broad conclusory terms and did not include any subsidiary findings which would give support to the Court's conclusory findings. However, the Fourth Circuit did affirm summary judgment in favor of the employer-appellee because appellants did not bring the instant action within thirty days under the Maryland Uniform Arbitration Act, because appellant was seeking to vacate the award received on August 24, 1978. This conclusion was reached despite appellant's contention that the United States Arbitration Act contained an appropriate limitations

period (9 USC § 12 - ninety days). The initial decision was maintained by the Fourth Circuit Panel after This Court's later decision in UPS v. Mitchell 101 S. Ct. 1559 (1981) was brought to the Panel's attention by Petition for Rehearing. (Appendix 110).

REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION

This Court should formulate a uniform statute of limitations in Vaca v. Sipes fair representation suits by adopting the six months limitations period in the National Labor Relations Act[1] or the ninety day period in the United States Arbitration Act.[2] This Court, it is submitted, should resolve the conflict among the Circuits.[3]

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[1] 29 USC § 160(b)

[2] 9 USC § 12

[3] Chauffeur's-Teamsters, etal., v. Jefferson Trucking Co., 628 F2d 1023, 1026 (7th Cir., 1980), Local 205 v. General Electric Co., 233 F2d 85, 99 (1st Cir. 1956)

as to whether the ninety day limitations statute in the United States Arbitration Act is applicable to collective bargaining agreements and to certain industries in § 301 actions under the Taft-Hartley Act. As stated earlier, the United States Court of Appeals, for the Fourth Circuit, found appellant filed this action eighty-seven days after the arbitration award was received, and the action would be timely under either the limitations period in the National Labor Relations Act, United States Arbitration Act, and the New York Statute in this Court's decision in United Parcel Service v. Mitchell, 101 S. Ct. 1559 (1981).

The Court has never ruled on

the question of whether a federal rather than a state statute is the appropriate limitations period in cases where an employee is suing a union for breach of the duty of fair representation and an employer for breach of the collective bargaining agreement. However, the Court in United Parcel Service v. Mitchell 101 S. Ct. 1559 did address the issue of a limitations period as between two competing state statutes,[4] in a fair representation suit. Justice Rehnquist's majority opinion did reflect the following critical observation in footnote two at 101 S. Ct. 1562, 1563:

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[4] New York Civil Practice Laws and Rules § 7511(a) or § 213

> The AFL-CIO has filed a brief arguing that in cases such as the present one courts should apply the six months limitation period of 10(b) of the National Labor Relations Act 29 USC § 160(b) 1978. We decline to consider this argument since it was not raised here or below.

Significantly, Justice Stewart, the author of Auto Workers v. Hoosier Cardinal 383 U.S. 696 (1966), in Mitchell, felt the six months limitation period in the National Labor Relations Act was the appropriate limitations period in fair representation suits. (Concurring Opinion, Stewart, J., see also Concurring Opinion, Blackmun, J.)

Justice Stewart, in Hoosier Cardinal, supra, in a purely contractual dispute, brought pursuant to § 301 of the Taft-Hartley Act

earlier stated:

> "The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for application of other rules on timeliness we are not required to decide and we indicate no view whatsoever."

See Also (Dissenting Opinion, White, J., Brennan, J., and Douglas, J.) 383 U.S. 709, 710

Petitioner respectfully contends that this Court's twin mandates in labor relations disputes of uniform national policies[5] and relatively rapid disposition of labor disputes[6] necessitates adoption of either the three-

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[5] Textile Workers v. Lincoln Mills, 353 US 348 (1951)

[6] United Parcel Service v. Mitchell, 101 S. Ct. 1559 (1981), Auto Workers v. Hoosier Cardinal 383 U.S. at 707

month limitation period in the Federal Arbitration Act or six-month limitation in the National Labor Relations Act. Otherwise, the trial court's use of forty-five[7] different state arbitration laws will deny equal protection of the laws and will continue to produce rampant

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[7] Petitioner United Parcel Service in UPS v. Mitchell relying on the writ filed by the Steelworkers in United Steelworkers v. Flowers, Docket No. 80-26 [Judgment vacated May 5, 1981] stated forty-two states had specific limitations periods. In fact, Nebraska has a limitations period, see Statutes 25-2101, et seq. (1979) as does Virginia Code Ann. § 8.01.577. Iowa recently adopted a limitations period in 1981 after Mitchell was decided, Iowa Sta. Ann. 679.1 et seq.

forum shopping, enormous and unnecessary confusion and uncertainty. Additionally, the Fourth Circuit's selection of an unduly short limitations period in the present dispute violated the principles of Hoosier Cardinal, supra, because Justice Stewart specifically found a seventy-five day limitations period could create a serious constitutional problem necessitating further court action.[8] Here, the Maryland Uniform Arbitration Act[9] only

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[8] 383 U.S. 707 - Note 7.

[9] Annotated Code of Maryland, Courts and Judicial Proceedings Article, § 3-224 (on vacating awards) (3-206 on scope of the Act). Maryland Rules of Procedure E-4 (1981).

provides thirty days for vacating awards and on its face does not apply to labor disputes, although the Maryland Court of Appeals has ruled it does in spite of this express statutory language.

Unquestionably, this Court has decided that uniform national policies are applicable to § 301 actions.

In Textile Workers v. Lincoln Mills U.S. 348, 356 (1957), Justice Douglas, in the confines of a § 301 action held:

> Federal Courts were to fashion from the policy of our national labor laws - general federal law applicable to suits on collective bargaining agreements.

In Teamster Local v. Lucas Flour Co., 363 U.S. 95, 103 (1962):

> Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills and that, more importantly, the subject matter of § 301(a) is peculiarly one that calls for uniform law.

In Auto Workers v. Hoosier Cardinal, 383 U.S. 696, 702:

> *The need for uniformity then is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote the formation of the collective bargaining agreement and private settlement of disputes under it.*

See Also (Concurring Opinion, Stewart, J.) Mitchell v. United Parcel Service 101 S.Ct. 1567, 1568

See Also (Dissent, White, J.) 383 U.S. 709, 710

This Court in another labor dispute, in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977)

held:

> The Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations period with national intersts in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. . . .State limitation periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.

Unlike the parties in UPS v. Mitchell 101 S. Ct. 1559 (1981), petitioner is asking that one of two federal statutes be applied in all States in all Vaca v. Sipes fair representation suits. The length of either statute complies with the

requirement of Mitchell, supra, that the grievance and arbitration process not remain in limbo because the longest limitation period would be six months. Furthermore, the trial court's use of forty-five different arbitration laws will interfere with uniformity of those processes which federal law is designed to promote specifically the private settlement of disputes under the collective bargaining agreement.

There are forty-five different arbitration laws that will have to be applied if the Court does not adopt a uniform limitations period.[10] Five States have no special time limitations

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[10] See Generally Appendix F in United Steelworkers v. Flowers Petition for Certiorari, Docket No. 80-26 and United Parcel Services v. Mitchell Petition for Certiorari Appendix 18-19.

period applicable to vacating awards including (Montana, North Dakota, Kentucky, Tennessee and West Virginia which also is in the Fourth Circuit.) Presently, the lower courts, in those five States, have no guidance concerning the appropriate limitations period. However, some of the forty-five States which have arbitration laws and procedures governing the vacation of arbitration awards are expressly inapplicable to disputes between employer and employee and labor organization and employee.[11]

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[11] As a result in South Carolina, which is also in the 4th Cir., the limitations period for bringing fair representation suits currently would be six years - see South Carolina 15.3.530. See also Alaska State § .09.43.010, Arkansas Statutes Ann. 34-511, Idaho Statutes § 7-901, Louisiana § 9:4201, Texas Rev. Civ. Stat. Ann. Title 10, Article 224, Washington Rev. Code Ann. 7.04.010.

In fact, there are numerous limitations periods among the States concerning the vacation of arbitration awards. For example, thirty States have ninety day limits for vacating awards.[12] In nine States the limit is less than ninety days,[13] which conflicts with This Court's edict in Hoosier (383 U.S. 707 Note 7). The statute of limitations for bringing an action to vacate an arbitration award in California is one hundred days.[14]

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[12] See Appendix A.

[13] See Appendix A.

[14] California Civil Procedure Code § 1288 (Deering)

Ironically in New Hampshire, the period is one year[15] which is twice as long as the period which Petitioner is advocating. In Missouri an action to vacate an arbitration award must be brought at the next term of court after the award is made.[16] In Georgia after an award is returned to Superior Court and entered in the minutes, either party can at that term to which said award is returned, suggest the award is illegal.[17]

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[15] New Hampshire (N.H. Rev. Stat. Ann. § 542.8.

[16] Missouri Ann. State. § 435.120 (Vernon).

[17] Georgia Code Ann. § 7-219.

Lower courts will face another uncertainty, that of conflicts of law, if the limitations period in state arbitration laws are adopted. Arbitration awards are often rendered outside the jurisdiction of the forum States hearing the fair representation suit, including the present case. The question would then be which state's statute for vacating awards would be appropriate if either States even had an appropriate statute.

Already, a writ of certiorari is pending before This Court on this very question. [18] To add to the

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[18] Inre General Atomic Corp., Docket No. 80-2106, 80-2107

confusion, only two States explicitly provide for enforcement of out of state awards.[19]

As noted earlier, there is a conflict between Circuits, regarding the applicability of the Federal Arbitration Act to § 301 actions. The Sixth Circuit in Hoover Motor Express v. Teamster Local 3327 217 Fed 2d. 49, 51, 52 (1954) held the Federal Arbitration Act was not only applicable to collective bargaining agreements but included the transportation industry as well.

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[19] Strausberg, "Confirmation of Out of State Arbitration Awards under the Maryland Uniform Arbitration Act," 9 Baltimore Law Rev. 37, 40, 41 (1979)

> We conclude that the exception embodied in Section One applies to contracts for hiring and not to collective bargaining agreements and therefore under the United States Arbitration Act, the District Court was authorized to entertain the application for a stay order.

See Also The Seventh Circuit, albeit in dicta, reached a similar result in Chauffeurs and Drivers v. Jefferson Trucking Co., 628 F2d 1023 (1980)

In Local 205 v. General Electric Co., 233 F2d 85, 99, 100 (1st Circuit, 1956) affd. 353 U.S. 547 on other grounds (1957), the Court reached a similar result:

> We hold that the exclusion in Section One does not embrace collective bargaining agreements, as distinguished from individual contracts of employment and that the arbitration act applies to collective bargaining agreements within the limitations of other sections of the act.

See Also International Union v. Kerr-McGhee Corp., G 18 F2d 657 (1978) Concurring Opinion, Holloway, J. Pizzuto v. Hall's Motor Transit Co. 409 F.Supp. 427 (ED/VA, 1976) DeLorto v. UPS 401 F.Supp. 408 (D/MASS. 1975) Communications Workers of America v. Pacific Tel. & Tel. 462 F.Supp. 736 (CD/CAL. 1978). UAW v. LaCrosse Cooler Corp., 406 F.Supp. 1213 (WD/WIS 1976). Teamsters v. Ruan Transportation Co., 473 F.Supp. 298 (ND/IND 1978)

An alternative to the three-month statute in the Federal Arbitration Act would be to apply the six-month limitations period in the National Labor Relations Act.

As this Court noted in Vaca v. Sipes at 386 U.S. 171, 197 Note 18, the

present action is different from Hoosier Cardinal:

> "It is a hybrid § 301 and breach of duty suit."

Justice Stewart in Mitchell noted:

> Moreover unlike Hoosier, where the employee's complaint was rooted solely in § 301 of the LMRA, the respondent here has two claims, each with its own discrete jurisdictional base. The contract claim against the employer is based on § 301, but the duty of fair representation is derived from the NLRA.

Congress never established a limitations period for actions brought pursuant to § 301.

However, this Court has repeatedly held the duty of fair representation is derived from the National Labor Relations Act which

does contain a six months limitation period in § 10b.[20] For example, see Ford Motor Co., v. Huffman 345 U.S. 330, 338 (1953) Sayres v. Oil Workers 375 U.S. 892 (1955) Humphrey v. Moore 375 U.S. 335, 342 (1964) Vaca v. Sipes 386 U.S. 171, 182 (1967) and Electrical Workers v. Foust 442 U.S. 42, 46 Note 8 (1978). In Machinists Local v. Labor Board 362 U.S. 411, 425 (1944), the Court held the limitations period in 10(b) was enacted to:

> Protect the continuing collective bargaining systems from delayed attack. The six-month bar of 10(b) is designed to strengthen and defend 'the stability of bargaining relationships.'

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[20] 61 Stat. 164.

Justice Stewart succinctly concluded in United Parcel Service v. Mitchell at 101 S.Ct. 1568:

> In 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. This is precisely the balance at issue here. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective bargaining agreement unquestionably implicates those consensual processes that federal labor law is designed to promote--the formation of the agreement and settlement of disputes under it.

The Court in Vaca, supra, held at 386 U.S. 186, 198:

> Breaches of the duty of fair representation were also unfair labor practices under 8(b) 1(a) and (b)2 of the NLRA.

Furthermore, the Court in Vaca held at 386 U. S. 186:

> The employee's suit against the employer however remains a § 301 suit, and the jurisdiction of the Courts is no more destroyed by the fact that the employee as part and parcel of his § 301 action finds it necessary to prove an unfair labor practice by the union, then it is by the fact that the suit may involve an unfair labor practive by the employer also.

See Also Footnote 18 386 U.S. 197.

An individual may not sue either an employer or union unless initially showing a breach by the union, not of some duty undertaken as a matter of contract, but of a statutory duty implied from the NLRA

and enforceable through the Act's administrative procedures.[21]

This Court in Hines v. Anchor Motor Freight 424 U.S. 554, 570, 571 (1976) confirmed that an employee in order to prevail in a fair representation suit against employer or union "must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union."

The additional element of showing a breach of contract damages should in no way affect the six-month limitation bar in the NLRA for several reasons. In Mitchell at

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[21] Amicus Curiae, AFL-CIO in United Parcel Service v. Mitchell at p. 19.

101 S.Ct. 1567, Justice Stewart found:

> If the Plaintiff can establish his breach of the duty of fair representation claim, he may then pursue his § 301 breach of contract claim. But here, unlike Hoosier, the latter action is a challenge to the result reached in the contractual grievance resolution system. Accordingly, the policy of promoting stability in collective bargaining underlying the time bar of 10(b) is applicable to this aspect of the respondent's case as well.

In McAllister v. Magnolia Petroleum Co., 357 U.S.221 (1957), this Court was faced with a similar problem. A seaman who was injured brought an action under the Jones Act to which Congress had affixed a limitations period. Nevertheless, in order to prevail, the seaman had to bring an action for unseaworthiness, which did not

contain a limitations period. The Court held at 357 U.S. 224:

> An action for unseaworthiness is combined with an action under the Jones Act a court cannot apply to the former a shorter period of limitations than Congress has prescribed for the latter. We think this is so whether the action is at law or admirality, in the state or federal courts.

The Court based its holding on the fact that:

> Congress has provided that a seaman shall have three years to bring his action under the Jones Act. A state court cannot reduce that time limit by applying its own statute of limitations to such an action. Enoel v. Davenport 271 U.S. 33 cf. Cox v. Roth 348 U.S. 207. As an essential corollary of that proposition, it may not qualify the seaman's Jones Act right by affixing a shorter limitation to his concurrent right of action for unseaworthiness.

See Also Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

Assuming Arguendo that the Court should find the federal statutes are not the appropriate limitations period, then the Court should apply the limitations period in the New York Statute approved in United Parcel Service v. Mitchell 101 S. Ct. 1559 (1981) in all states in all fair representation suits. The reasons are three-fold. First, the states which do not have special limitations periods in their arbitration laws for the vacating of arbitration awards need a limitations period as do the states which have arbitration laws and procedures that are inapplicable to labor disputes. The Court's adoption of the New York Statute would eliminate unreasonably short constitutionally infirm limitations periods

and eliminate forum shopping. The New York Arbitration Act is the model upon which the Uniform Arbitration Act is based which has been adopted by twenty-one States.[22] The New York statute would appear not to suffer the infirmity of being too short a limitations period to bring a complaint because it provides ninety days[23] to vacate an award which is the same length as the Federal Arbitration Act which has passed constitutional muster in the past.[24]

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[22] Pirsig, Some Comments Upon the Uniform Arbitration Act 10 V and. L. Rev. 685, 689-691 (1957) See Also Supplement Uniform Laws Annotated, p. 1

[23] New York (PLR 7511(a) McKinney.

[24] Local 205 v. General Electric Company affd. 353 U.S. 547 (1957)

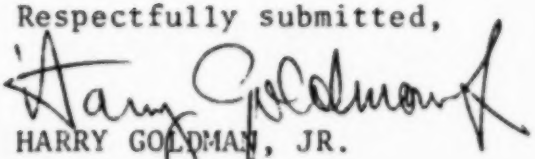
If the Court feels that it is bound by Hoosier Cardinal, supra, to apply a state statute for a limitations period, then there is no reason why the time limit in the New York Arbitration Statute should not be used in all states which would have the beneficial effect of eliminating forum shopping, confusion and uncertainty.

CONCLUSION

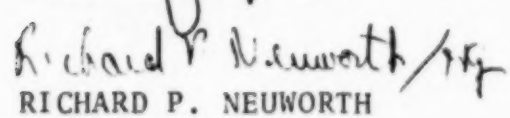
* * *

For all of the above reasons, the Writ of Certiorari should be granted.

Respectfully submitted,



HARRY GOLDMAN, JR.



RICHARD P. NEUWORTH

Counsel for Ronald Sine
and Larry Danner,
Petitioners
1123 Munsey Building
Calvert and Fayette Street
Baltimore, Maryland 21202
301-837-4222

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Ronald Sine and Larry Danner,
Appellees

Vs.

Mitchell Transport, Inc.
and Local 992, International
Brotherhood of Teamsters,
Appellants

No. 76-1201
No. 76-1202
UNPUBLISHED

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge

Argued November 9, 1976
Decided March 10, 1977

Before: HAYNSWORTH, Chief Judge
WINTER AND HALL,
Circuit Judges

Per Curiam:

Defendants, Mitchell Transport, Inc., and the International Brother-

hood of Teamsters, Local 992, appeal from a jury verdict which found they had violated their collective bargaining agreement to the injury of Local 992 members Sine and Danner.

The company transferred the majority of its trucks operating out of its Baltimore terminal to its Union Bridge, Maryland, terminal. At that time, the company posted a "volunteer list" for its Baltimore drivers to sign up to transfer to Union Bridge. Five drivers, including Sine and Danner, subsequently transferred.

As a result of dissatisfaction among Union Bridge drivers who feared that the Baltimore drivers could exer-

cise their company seniority in preference to the Union Bridge drivers' seniority rights, the Joint Committee, authorized by the collective bargaining agreement, issued its Decision Number 839. It required the company to repost a list at Baltimore and effectively required the Baltimore drivers with higher seniority to return to Baltimore. Sine and Danner were lower seniority employees. They remained at Union Bridge with higher company seniority than some of the Union Bridge drivers.

Subsequently, there was a meeting of Sine and Danner with representatives of the employer and of the union. During this meeting, the union business agent, Butler, made a hostile

remark, indicating he wished the plaintiffs back in Baltimore. In the end, each driver signed a letter in which he agreed to accept terminal rather than company seniority status in order to stay at Union Bridge. The letter, if effective, was a surrender of their rights under Decision Number 839. The testimony was in conflict as to whether that decision was read to the drivers. If it was, or if portions of it were, it is much to be doubted that the drivers understood their rights, for the decision and its language were complicated.

After approximately six months, Danner suffered a lay off as a result of having only terminal seniority.

A grievance was filed asking that the previous agreement be declared a nullity as violating the collective bargaining agreement's ban on extra-contract agreements. The Joint Committee denied the grievance in its Decision Number 1007.

There is sufficient evidence in this case to support the jury's verdict and to show both a breach of the collective bargaining agreement by Mitchell and unfair representation of Sine and Danner by the Union.

The letter signed by the Baltimore drivers did not operate as a waiver because a waiver is an intentional relinquishment of a known right. Here, there is a

firm basis for a finding by the jury that Sine and Danner were not adequately informed of their rights, and, hence, under accepted principles of contract law, did not waive those rights.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Ronald Sine and Larry Danner,
Appellants

Vs.

Local 992 International
Brotherhood of Teamsters;
Eastern Conference of Teamsters
and Mitchell Transport, Inc.
Appellees

No. 79-1625
PUBLISHED

Appeal from the United States District
Court for the District of Maryland
at Baltimore. Joseph H. Young,
District Judge

Argued June 3, 1980
Decided March 24, 1981

Before: HAYNSWORTH, Chief Judge
WIDENER, Circuit Judge
HOFFMAN, Senior District Judge*

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* United States District Court for
the Eastern District of Virginia

WIDENER, Circuit Judge:

This controversy comes before us for a second time. The plaintiffs, Ronald Sine and Larry Danner, have brought suit under § 301 of the Labor Management Relations Act, 29 USC § 185, and the United States Arbitration Act, 9 USC § 1 et seq, against their employer, Mitchell Transport, Inc. (Mitchell or Company), Local 992 of the International Brotherhood of Teamsters (Local), and the Eastern Conference of Teamsters (Conference). Sine and Danner are seeking to vacate an arbitration decision denying their claims against Mitchell. From summary judgment for the defendants, plaintiffs appeal. We affirm the district court's denial of

the claim to vacate the arbitration award, but vacate the summary judgment on the claims for breach of the duty of fair representation and remand that matter to the district court for further consideration.

The facts surrounding this dispute are somewhat involved and thus require a rather detailed account. Mitchell is an interstate common carrier, engaged primarily in hauling cement. It maintains a number of terminals throughout the United States, only two of which are pertinent here, one in Union Bridge, Maryland and another in Baltimore.[1]

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[1] The Baltimore terminal is no longer operational.

In the spring of 1971, Mitchell transferred seven of the twelve tractors at the Baltimore facility to Union Bridge because of a change in customer demands. The transfer meant a loss of job opportunities at Baltimore and increased the work available at Union Bridge. The Company posted what is called a "sign-up bid" list at Baltimore, which allowed the Baltimore drivers to volunteer to transfer to Union Bridge. The transfer called for terminal seniority for purposes of dispatch but company seniority whenever layoffs occurred. Five of the Baltimore drivers, including the present plaintiffs, signed the list and transferred to Union Bridge. They were placed at the bottom

of the driver seniority list for job selection at Union Bridge in accordance with § 5.7 of the Eastern Area Cement Haul Agreement,[2] the collective bargaining agreement.

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[2] Section 5.7 of the collective bargaining agreements, from March 1, 1974 through February 28, 1977, provided in pertinent part:

> (b) Closing of branches, terminals, divisions, or operations:
>
> *****
>
> (2) . . . .Such employee, however, shall go to the bottom of the seniority board and shall have the right of job selection only in accordance with the seniority at such terminal. However, he shall exercise his Company seniority for layoff purposes and other contract benefits.

Effective March 1, 1977, § 5.7 was changed to provide for virtually complete dovetailing of seniority rosters:
(fn. 2 continued next page)

During the summer of 1971, a dispute arose at Union Bridge regarding the seniority of the newly transferred drivers from Baltimore. The original Union Bridge drivers objected to the floating seniority of the transferees, who could exercise their company seniority whenever they were laid off.[3] As a result of that

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(fn. 2 continued)

(b) Closing of branches, terminals, divisions or operations:

*****

(2) . . . .Such employee, however shall be dovetailed in accordance with procedures outlined in Article 5, Section 5.5.

Section 5.5.calls for dovetailing of the active rosters and dovetailing of the inactive rosters. When someone moves from inactive to active, he is dovetailed into the active roster with full company seniority.

(fn. 3 continued on next page)

dispute, the Local 992 union steward at the terminal, hoping to clear up the situation, filed a grievance with the union. The grievance, which noted that two high seniority and three low seniority Baltimore

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(fn. 3 continued)

[3] A Company representative had interpreted § 5.7 to mean that once a transferee driver had not worked on a consecutive Thursday, Friday, and Saturday, that represented a layoff for purposes of the contract and he could then exercise his Company seniority and thus work where an old Union Bridge employee with greater terminal seniority, but less company seniority, would not work. Because of that interpretation, a number of the original Union Bridge drivers, in order to protect their seniority, stayed out of work on a Thursday to prevent the Baltimore drivers from obtaining layoff status because the Company was forced to depend on the Baltimore drivers in the absence of the Union Bridge drivers who had stayed out.

drivers had transferred to Union Bridge, asserted that the original Union Bridge drivers were being denied their full working opportunities. It requested that all five drivers be returned to Baltimore because work was available for them there.

The grievance was heard before the Eastern Area Tank and Cement Haul Joint Committee, an arbitration panel established by the collective bargaining agreement, whose decisions, according to the agreement, are final and binding.[4] The Joint Committee, in Case No. 839, determined that only those employees who were forced to transfer to Union Bridge because of a loss of work at Baltimore were entitled to exercise

floating seniority. Thus, the decision upheld only the right of the three junior drivers to transfer to Union Bridge, which group included the present plaintiffs. The decision required the Company to repost a list at Baltimore and required the senior drivers to return to Baltimore at the soonest practical opportunity.

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[4] The Joint Committee consists of three (or other equal number of) representatives of the Company and three of the Union. A majority of the Committee is required to rule on a grievance; in the event of a deadlock, the grievance is submitted to an impartial arbitrator, whose decision is also final and binding. See § § 7.3 and 7.5 of the collective bargaining agreement.

In October 1971, the five former Baltimore drivers had meetings with representatives of the Company and the Union. The original Union Bridge drivers wanted all the Baltimore drivers to return to Baltimore; none of the Baltimore drivers, however, wanted to return. In the end, each of the Baltimore drivers, including the plaintiffs Sine and Danner, signed a letter in which he agreed to accept terminal rather than company seniority, except for fringe benefits, in return for the right to remain at Union Bridge.

Some six months later, around May of 1972, Sine and Danner were both laid off. Subsequently, both filed grievances requesting company seniority for purposes of layoffs,

and the dispute was brought before the Joint Committee as Case No. 1007. The plaintiffs argued that the letter they had signed forfeiting their entitlement to floating seniority was null and void.[5] The Committee, however, rejected their contention; "Based upon the facts presented including the letter dated November 10, 1971, which was executed by the parties, the grievance is denied."

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[5] They argued it was null and void pursuant to § 6.2 of the collective bargaining agreement:

> The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

Following that decision, Sine and Danner, in July 1973, brought suit in the District of Maryland against the Local and the Company, seeking damages and injunctive relief restoring their company seniority. On June 6, 1975, the jury returned a verdict in favor of the plaintiffs against both defendants and awarded Sine $14,000 and Danner $11,000 in damages. With regard to the claim for injunctive relief, however, the court, in a letter dated October 29, 1975, advised that it was denying the plaintiffs' claim:

> After reviewing the instructions, the evidence, and the pretrial order I find nothing in the jury's verdict that would require

> or justify the issuance of injunctive relief as requested by the plaintiffs. The actions of the parties are controlled by various union agreements and those agreements set forth the procedures to be followed in enforcing the rights of all parties. This enforcement neither requires nor justifies Court intervention based upon the jury's verdict.

The court filed a formal order denying injunctive relief on October 31, 1975.

In July 1975, prior to the court's denial of the requested injunctive relief, Sine and Danner once again filed grievances asking for their rightful company seniority and back pay from June 6, 1975, the date of the jury verdict. These grievances were heard together before the Joint Committee as Case No. 1384. The Union's attorney assisting

Sine and Danner contended that not only was the letter null and void as an extra-contractual agreement, but also that the grievants were never aware of Case No. 839, and that fact negated the letter. The Committee, however, in its decision issued in November, 1975, denied the grievance with respect to both the seniority rights and back pay.[6] Sine and Danner made no attempt to vacate that decision of the Joint Committee.

On December 3, 1975, the Local signed a consent order in which it agreed to observe the company seniority of the plaintiffs for daily dispatch purposes. The Company was not a party to that order which was entered by the district court.

On March 10, 1977, this court, in an unpublished opinion, affirmed the plaintiffs' jury verdict against the Company and the Local. We held:

> There is sufficient evidence in this case to support the jury's verdict and to show both a breach of the collective bargaining agreement by Mitchell and unfair representation of Sine and Danner by the union.
>
> The letter signed by the Baltimore drivers did not operate as a waiver because a waiver is an intentional relinquishment of a known right. Here, there is a firm basis for a finding by the jury that Sine and Danner were not adequately informed of their rights, and, hence, under accepted principles of contract law, did not waive their rights.

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6 "Based upon the facts presented with respect to the grievants' claim for back pay including interest, the grievance is denied.

"Based upon the facts presented with respect to the grievants' claim for seniority rights, the grievance is denied."

Sine v. Mitchell Transport, Inc., No. 76-1201 (4th Cir. March 10, 1977), at 4-5.

Shortly after this court's affirmance of the jury's award, Sine and Danner again filed a grievance seeking back pay and seniority. This grievance went before the Joint Committee as Case No. 1524, and the Committee this time deadlocked on the vote, thus sending the matter to arbitration pursuant to the applicable provisions of the collective bargaining agreement.[7]

The arbitrator held, contrary to the jury's determination and contrary to that of this court, that Sine

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[7] See Note 4 supra. The plaintiffs also contend that the Union representatives on the Committee voted to deadlock only because of a threatening letter sent to the Committee by the plaintiff's counsel.

and Danner waived their rights to company seniority when they signed the letter. He thus denied the grievance with regard to the claim for back pay. However, with regard to the claim for seniority, the arbitrator upheld the grievance for equitable reasons and directed that Sine and Danner be dovetailed into the roster at Union Bridge in accordance with their company seniority. (The collective bargaining agreement which became effective on March 1, 1977 had altered the transfer policy and provided for complete dovetailing of rosters whenever there was a transfer of work from one terminal to another.) Because the Baltimore terminal had been closed

and the newly transferred drivers with less company seniority would bump Sine and Danner, the arbitrator decided that the plaintiffs should be granted full seniority rights. The arbitrator issued his decision on August 22, 1978, and it was received at the Eastern Conference of Teamsters on August 24, 1978.

Still dissatisfied, Sine and Danner filed this suit under the Labor Management Relations Act and the United States Arbitration Act against the Company, the Local, and the Conference. The plaintiffs sought to vacate the arbitrator's award on the theory that the earlier jury verdict and this court's affirmance of the award should be accorded res judicata

effect. The court granted the Company's motion on the ground that the plaintiffs' claim was barred by the appropriate statute of limitations found in the Uniform Arbitration Act effective in Maryland, Md. Code Ann. § 3-201 et seq, which provides for a thirty day period to set aside an award. Finally, the court granted the Unions' motions, saying that the plaintiffs' claim were groundless and had been discredited in the plaintiffs' own words.[8] This appeal followed.

The first issue for consideration is whether the plaintiffs' claim against the defendant Mitchell

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[8] Because of the manner in which it disposed of the case, the district court did not pass upon other
(fn. 8 continued on next page)

is barred, as the district court held, by the thirty day limitations' period provided for in the Maryland Uniform Arbitration Act. The plaintiffs brought this action to vacate the arbitrator's award under the United States Arbitration Act and § 301 of the LMRA, 29 USC § 185.[9] The United States Arbitration Act provides for

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(fn. 8 continued)

defenses urged by the Unions or the Company, as we do not. Of course, those applicable to the Unions may be considered on remand.

[9] The plaintiffs' claim of jurisdiction under the United States Arbitration Act, 9 USC § et seq, is not well taken. This statute does not furnish jurisdiction; rather, it requires an independent base for it. 9 USC § 4 provides for relief in a district court which "would have jurisdiction under Title 28" "save for such [arbitration] agreement," and this provision has been correctly literally construed. E.g. Commercial

(fn. 9 continued on next page)

a three month limitations' period for a suit to vacate or modify an arbitration award. 9 USC § 12. However, the act also expressly states that it is inapplicable to actions concerning contracts of employment of workers engaged in interstate commerce, 9 USC § 1, and this court has held that the exclusionary provision applies in cases such as the

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(fn. 9 continued)

Metals Co. v. Balfour, Guthrie, & Co. Ltd., 577 F2d 264 (5th Cir. 1978); Metro Industrial Parking Corp. v. Terminal Const. Co., 287 F2d 384 (2d Cir. 1961). Nevertheless, we reach the merits of the applicability of the United States Arbitration Act, for the district court "save for. . . [the arbitration]agreement" had jurisdiction under 29 USC § 185(a).

one before us here. United Electrical Radio & Machine Workers of America v. Miller Metal Products, Inc., 215 F2d (4th Cir. 1954); International Union United Furniture Workers of America v. Colonial Hardwood Floor Co., 168 F2d 33 (4th Cir. 1948). Mitchell is an interstate carrier, and this dispute concerns the collective bargaining agreement. Thus, the United States Arbitration Act and its three month statute of limitations have no direct application in this case.

Although some courts have looked to the limitations' period provided for in the United States Arbitration Act for actions to vacate an arbitration award, e.g., Communication Workers of America v. Pacific Telephone & Telegraph Co., 460 F.Supp.

755 (E.D.N.Y. 1978). International Union (UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), requires us to look to State law for determination of the limitations' period for a claim under 29 USC § 185. Additionally, we are required under Campbell v. City of Haverhill, 155 U.S. 610 (1895), to follow the Rules of Decision Act, 28 USC § 1652, in determining which statute of limitations to apply. Under that statute the "laws of the several states, except where. . . Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States. . . ." In this case Congress has not provided for a limitations' period for

actions under § 301 to vacate an arbitration award, and has specifically excluded the application of the United States Arbitration Act to actions concerning such collective bargaining agreements. Thus, given that Congress has not provided otherwise, we look to the law of Maryland to determine the appropriate limitations' period.

The State statute of limitations to be selected is determined by characterizing the nature of the § 301 suit. Hoosier Cardinal, supra. Because this action against the Company is one which requires the vacation of an arbitrator's award, we characterize the suit as one to vacate an award and look to the appli-

cable statute of the State for limitations of the action. E.g. Barbarino v. Anchor Motor Freight, Inc., 421 F.Supp. 1003, 1006 (W.D.N.Y. 1976), and cases there cited; Wallace, supra, and cases there cited. This holding gives effect to the national labor policy of deciding labor disputes by arbitration if possible. Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960).

Section 3-224 of the Maryland Code Annotated provides for a thirty day limitations' period:

> (a) Petition--(1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

> (2) If a petition alleges corruption, fraud, or other undue means it shall be filed within 30 days after the grounds become known or should have been known to the petitioner. [10]

The award here was issued on August 22, 1978, and the Local's attorney forwarded a copy of the opinion and award to the plaintiff's counsel on August 24, 1978. The district court found that the plaintiffs became aware of the outcome no later than September 1, 1978, and the plaintiffs do not challenge that finding on appeal.

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[10] There is no merit to plaintiff's argument that Howard v. Aluminum Workers International Union, 589 F2d 771 (4th Cir. 1978), requires a three year limitations' period be applied here for actions based upon tort. That case did not involve the vacation of an arbitration award. Rather, it was only a § 301 action against a union for a breach of the duty of fair representation.

Plaintiffs filed the present action on November 20, 1978, which is more than thirty days after they received the award; thus, the action is untimely under Md. Code Ann. § 3-224 (a)(1).

Although the plaintiffs allege that the arbitrator's decision was "tainted with corruption," they do not contend that they filed this action within thirty days of learning of the alleged corruption; indeed, the record would not support such a contention.[11] Thus, they cannot come within § 3-224(a)(2) of the Maryland Act in order to avoid the bar of the thirty day's limitation period if fraud was involved as alleged (but which is not shown by the present record).

(fn. 11 on next page)

(fn. 11 continued)

[11] See Sine's deposition testimony:

> Q. . . .I want to know when in your own mind you reached the decision that the arbitrator is corrupt?
>
> A. After I got the decision.
>
> Q. Okay. Now, how much after.
>
> A. When I got it.
>
> Q. When you got--
>
> A. Yes.
>
> Q. --and read it, you reached that conclusion--
>
> A. Right.
>
> Q. --correct?
>
> A. Right. When we got the reason for not giving it.

See also Danner's deposition testimony:

> MR. GOLDMAN: Go ahead. When did you reach a conclusion that the arbitrator was corrupt after you got the decision?
>
> THE WITNESS: After I got the decision or read it. I felt--

(fn. 11 continued on next page)

Because the claim is barred by the statute of limitations, we need not consider the plaintiffs' argument that the earlier decisions of the district court and this court should be given res judicata effect.

(fn. 11 continued)

BY MR. SUSANIN:

Q. As soon as you became aware of the decision?

A. Yes. I would say that there.

We now consider whether the district court erred when it granted summary judgment against the plaintiffs on their claim against the union for breach of the duty of fair representation. In their complaint, the plaintiffs alleged that the breach consisted of, among other things,

> hindering, delaying and postponing the plaintiffs' Grievance Procedures at each and every stage, and, only after threat of suit from plaintiff's attorney, grudgingly years late, deadlocking the final step of the Grievance procedure before Arbitration, so as to require said Arbitrator, who was either incompetent or corrupt, or both, was malselected by the parties, failing to advance and argue the simple and legal, factual premises from the trial record, prayers and instructions, court charge, briefs of the parties, record on Appeal and Opinion

> in the United States Court of Appeals for the Fourth Circuit, waiving and permitting the delay of his Decision for 10 months and 22 days, so that the amount of back pay which the Arbitrator should have awarded to the employees, would have made an Award of back pay even more costly, from which the Arbitrator obviously shrank, and other breaches of the aforesaid Union's duty of fair representation, were by it committed.

The district court stated that the essence of the plaintiffs' claim against the Union was that the "Local 992's attorney did not present a 'thorough' case, that the Union failed to urge the arbitrator to render a more expeditious decision, and that the Union was somehow responsible for the lengthy delay in the issuance of the arbitrator's

final decision." The court did not detail the evidence but held that many of the plaintiffs' allegations were totally groundless, as well they may have been, based on what it described as a detailed and thorough refutation by the defendants and by the plaintiffs' own words. The other allegations, the court held, did not amount to arbitrary or discriminatory behavior by the attorney or any dishonest conduct on the part of the Union. The district court thus granted the defendants' motion for summary judgment on the breach of duty claim.

The plaintiffs have raised a number of factual allegations, and some of the facts we are now asked to consider might arguably have been

considered by the district court to prove that the Unions' conduct was arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 191 (1967). While the district court did relate a few of the facts in part, we are unable to ascertain from its opinion just what facts it relied upon for determining that the plaintiffs' claim against the Unions was without merit. We feel that this is a case where the district court did not undertake a critical review of the relevant facts so as to give support to its conclusory findings. Lewis v. Tobacco Workers' International Union, 577 F2d 1135, 1146 (4th Cir. 1978). Accordingly, the judgment of the district court with respect to the § 301 claim against

the unions for breach of the duty of fair representation is vacated and remanded for reconsideration by the district court.[12] On remand, the district court may consider the case on the record before it, or may, within its discretion, consider further factual development if it be so advised.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

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[12] The district court, because it determined that the plaintiffs' claim for breach of the duty of fair representation was without merit, did not decide whether the Conference, independently of the Local, owed such a duty to the plaintiffs. On remand, if the court should determine that the plaintiffs' claim does have merit, it should also consider whether the plaintiffs may seek recovery from both the Local and the Conference.

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD SINE, ET AL. V. LOCAL NO. 992 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.	CIVIL NO. Y-78-2315

I. THE FACTS

Plaintiffs Ronald Sine and Larry Danner have brought this action under section 301 of the Labor Management Relations Act ("LMRA"), 29 USC § 185(a), and the provisions of the Federal Arbitration Act, 9 USC § 1, in an effort to vacate an arbitration award. The present action relates to an earlier case filed in 1973 in which plaintiffs received a jury

award of $25,000 as a result of a suit brought against Local Union No. 992, International Brotherhood of Teamsters ("Union" or "Local 992"), and Mitchell Transport, Inc. ("Mitchell").

Plaintiffs are driver employees of Mitchell, an interstate motor carrier. They alleged that defendant Mitchell, in violation of their collective bargaining agreement, denied them proper seniority positions for dispatch purposes. They also contended that the Union breached its duty of fair representation in not properly or adequately advancing their arguments against Mitchell. As a result, Sine and Danner filed suit in this Court against Mitchell and the Union,

Civil Action No. 73-724-Y (D/MD) 1975), in which they sought both monetary as well as injunctive relief granting them their seniority positions.

On June 6, 1975, a jury awarded the plaintiffs $25,000 in damages. By letter dated October 29, 1975, however, the Court advised the parties that in light of the jury's verdict, injunctive relief would be unnecessary since "[t]he actions of the parties are controlled by various union agreements and those agreements set forth the procedures to be followed in enforcing the rights of all parties." Letter dated October 29, 1975. The Court issued an appropriate Order denying plaintiffs' seniority request on

October 31, 1975.

After the verdict but prior to the October 31, 1975 Order, plaintiffs filed two additional grievances on June 30, 1975 and July 31, 1975 seeking restoration of their seniority plus back pay from June 6, 1975 to the date of the grievance. After processing, these two grievances were presented to the Joint Area Committee as case no. 1384.

The Union provided plaintiffs with an attorney from the Eastern Conference of Teamsters, and their case was heard by the Eastern Area Tank and Cement Haul Joint Committee ("JAC") on November 19, 1975. The JAC decision denied the claim for seniority and the claim for back pay. Under the terms of the

collective bargaining agreement this decision was binding and was so recognized by plaintiff Sine. See Sine Deposition at 208-09. Neither plaintiff tried to appeal or vacate the JAC decision in case no. 1384.

On May 14, 1976 the Fourth Circuit Court of Appeals denied plaintiffs' cross appeal of this Court's denial of their seniority positions. Several months later, on March 10, 1977, the Fourth Circuit affirmed the jury's $25,000 damage award.

Undaunted in their efforts to obtain their seniority positions, plaintiffs filed an identical grievance on April 13, 1977. See Sine Deposition at 204. Designated

as case no. 1524, this case was heard by the JAC on May 24, 1977. While no new factual matters were presented, plaintiffs did submit a letter from their attorney who threatened to sue each JAC member unless the case was deadlocked and sent to arbitration.[1] The JAC did become deadlocked, and both plaintiffs indicated that they believed their attorney's letter was a crucial reason for this result. See Sine Deposition at 212-13; Danner Deposition at 503-04.

Mitchell and the Union then utilized the Federal Mediation and Conciliation Service to select

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[1] A deadlock results when the Union representatives on the panel vote in favor of the grievance and the company representatives vote against it.

arbitrator Jay Kramer, Esquire, on or about June 17, 1977. Kramer was a former Chairman of the New York State Labor Relations Board. Case no. 1524 was heard on October 3, 1977, and Arbitrator Kramer issued his decision on August 22, 1978. The arbitrator had denied plaintiffs' back pay claim but granted their requested seniority change based upon an intervening change in the relevant provisions of the collective bargaining agreement. As a result of this decision, plaintiffs filed this action on November 20, 1978 in an attempt to vacate only that part of the arbitrator's award denying their back pay claim.

The case is presently before this Court on cross motions for summary judgment. Plaintiffs seek partial summary judgment vacating the arbitrator's award denying damages on the novel theory that this Court's initial decision after the jury's verdict should be accorded res judicata effect insofar as the present action is concerned. Defendants seek summary judgment on two grounds. First, they contend that the appropriate statute of limitations mandates dismissal of plaintiffs' complaint. Second, they aregue that the Union did not, as a matter of law, breach its duty of fair representation to plaintiffs.

II. RES JUDICATA

If ever a case were litiated beyond the point of all practical utility, this case constitutes a prime example. In denying plaintiffs' request for injunctive relief over four years ago, this Court clearly indicated that the monetary damages awarded by the jury were to constitute the exclusive remedy obtained from this forum. Now, having had several additional bites at the same apple by filing grievances subsequent to the jury's award, plaintiffs seek to present their case before this Court yet again. While noting plaintiffs' dogged preseverance, this Court has a duty both to litigants and society

to bring litigation to a halt when enough is too much. See, e.g., Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers of America, Local 15, AFC-CIO, 242 F.Supp. 606, 610-11 (D/NJ 1965).

One jury verdict, two grievances, and one partly successful arbitration later, plaintiffs have returned to this Court to obtain what Arbitrator Kramer denied them. Having already used the arbitration route to obtain the injunctive remedy denied them in this Court, plaintiffs without hesitation seek to turn a denial of injunctive relief into a binding award of back pay for a one month period subsequent to the jury's award of $25,000.

While res judicata may be a mystery to some, it surely does not operate through the vehicle of the non sequitur.

In denying plaintiffs' request for injunctive relief the Court did nothing more than that. It expressed no opinion as to any award of back pay--an issue which arose after the original trial had been concluded. Having persisted long enough to win injunctive relief from Arbitrator Kramer, plaintiffs now refer to that same arbitrator's decision as a "completely lawless interpretation of the facts and law" which "flounted" what plaintiffs claim was finally put to rest by this Court.

The principles of res judicata may not be applied so as to allow a party to play both ends against the middle. What they could not obtain from this Court, plaintiffs got through arbitration, and what they could not win through arbitration, they now seek to recover in this forum. This Court's earlier ruling denied plaintiffs injunctive relief so as to permit further grievance proceedings de novo to decide their seniority complaints. The arbitration award resulted from that de novo procedure, and this Court's ruling obviously cannot be given res judicata effect in the present litigation.

III. STATUTE OF LIMITATIONS

Defendants seek to dismiss plaintiffs complaint on the grounds that since it constitutes an action to vacate an arbitration award it must have been filed within thirty days of the decision as required by the Maryland Uniform Arbitration Act, Md. CTS. & JUD. PROC. CODE ANN. § 3-201 et seq. Plaintiffs contend that the appropriate limitations period is the ninety day period permitted under the U. S. Arbitration Act, 9 USC § 12. Arbitrator Kramer rendered his decision on August 22, 1978, and plaintiffs became aware of the outcome no later than September 1, 1978. Sine Deposition at 219, 220. The present case was instituted

on November 20, 1978.

Plaintiffs have brought this case under Section 301 of the LMRA, 29 USC § 185(a) and the provisions of the Federal Arbitration Act, 9 USC § 1. The latter act, however, expressly states that it is inapplicable to actions brought concerning collective bargaining agreements covering workers engaged in interstate commerce. (See United Electrical R & M Workers v. Miller Metal Products, 215 F2d 221 (4th Cir. 1954); International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 168 F2d 33 (4th Cir. 1948). Defendant Mitchell is an interstate carrier, making the Federal Ar-

bitration Act irrelevant.

Under the remaining basis for jurisdiction, 29 USC § 185(a), the appropriate statute of limitations must be that contained in the Maryland Uniform Arbitration Act since there are no express limitations in the LMRA on bringing a section 301 action. Federal common law therefore directs that the analogous state limitations period be adopted and applied. United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966). Section 3-224 of the Maryland Uniform Arbitration Act provides a thirty day limitations period for actions seeking to vacate an arbitrator's award. Since plaintiffs brought

the present case beyond the limitations period, it is clearly untimely.

IV. FAIR REPRESENTATION

Plaintiffs also submit that Local 992 breached its duty of fair representation in handling their claims during the grievance and arbitration process. They now concend that Local 992's attorney did not present a "thorough" case, that the Union failed to urge the arbitrator to render a more expeditious decision, and that the Union was somehow responsible for the lengthy delay in the issuance of the arbitrator's final decision. Taken together, these allegations purport to establish taht Local 992

represented plaintiffs' interests in an arbitrary, discriminatory, and bad faith manner in violation of the standards set forth in Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); and Vaca v. Sipes, 386 U.S. 171 (1967).

Counsel for Local 992 as well as for Mitchell have prepared a detailed and thorough refutation of plaintiffs' claims, and the Court is satisfied that they are totally groundless. Both Local 992 and Mitchell have documented repeated instances either in plaintiffs' own depositions or in the transcripts from prior proceedings involving these parties where the allegations have been totally dis-

credited in plaintiffs' own words. Such behavior clearly undermines plaintiffs' claims of inadequate representation. Hardee v. North Carolina Allstate Services, Inc. 537 F2d 1255, 1259 (4th Cir. 1976). While other allegations seek to challenge attorney tactics, there is nothing in these claims amounting to arbitrary or discriminatory behavior by the attorney or any fraudulent, deceitful, or otherwise dishonest conduct on the part of the union. Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F2d 181 (4th Cir. 1972); Walden v. Local 71, International Brotherhood of

Teamsters, Chauffeurs, Warehousemen and Helpers of America, 468 F2d (4th Cir. 1972).

Since this case may be fully disposed of for the reasons already supplied, the Court declines comment on defendant Mitchell's contention that plaintiffs' grievances which resulted in the Kramer award were never arbitrable because of the previous JAC decision in case number 1384. Mitchell never sought to vacate the Kramer award, and this Court is content to put matters completely to rest by preventing plaintiffs from themselves vacating that part of Kramer's award which denied them back pay.

Accordingly, it is this 28th

day of August, 1979, by the United States District Court for the District of Maryland, ORDERED:

1. That plaintiffs' motion for partial summary judgment be, and the same is, here DENIED; and

2. That all defendants' motions for summary judgment be, and the same are, hereby GRANTED.

s/ JOSEPH H. YOUNG
United States District Judge

Dated: August 28, 1979

UNITED STATES COURT OF
APPEALS FOR THE
FOURTH CIRCUIT

RONALD SINE
and
LARRY DANNER
Appellants

NO. 79-1625

V.

LOCAL NO. 992, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; AND MITCHELL TRANSPORT, INC.
Apellees

O R D E R

The case of United Parcel Service v. Mitchell, No. 80-169, 49 L.W. 4378 (April 20, 1981) having been decided, and being of the opinion the Petition for Rehearing in this case is without merit, it is accordingly, ADJUDGED AND ORDERED, that the Petition for Rehearing,

together with its supplement, shall be, and the same hereby is DENIED.

With the concurrence of Judge Haynsworth and Judge Hoffman.

s/ H. E. WIDENER, JR.
For the Court

Filed: May 12, 1981

A P P E N D I X A
State Statutes of Limitations

STATE STATUTES OF LIMITATIONS GOVERNING ACTIONS TO VACATE ARBITRATION AWARDS.

In twenty-eight of these states, the time limit prescribed is 90 days:

Alaska Stat. § 9.43.120; Ark. Stat. Ann. § 34-522; Del. Code Ann. Tit. 10 § 5714; Fla. Stat. Ann. § 682.13; Idaho Code § 7-912; Ill. Ann. State. ch. 10 § 112 (Smith-Hurd); Ind. Code § 34-4-2-13; Kan. State. Ann. § 5-412(b); LSA-R. S. 9:4213 (West): Me. Rev. Stat. Ann. Tit. 14 § 5938; Minn. Stat. Ann. § 572.20; Nev. Rev. Stat. Ch. 38 § 145 (2); N. J. Stat. Ann. § 2A:24-7 (West); N.M. Stat. Ann. § 44-7-13; N.Y. CPLR § 7511 (McKinney); N. C. Gen. Stat. § 1-567.13; Ohio Rev. Code Ann. § 2711.13 (Page); Okla. Stat. Ann. Tit. 15 § 812 (West); 5 Pa. Cons. Stat. Ann. § 173 (Purdon); R.I. Gen. Laws § 10-3-15; S.C. Code § 15-48-130: S. D. Comp. Laws § 21-25A-25; Tex. Ann. Civ. St. art. 237; Utah Code Ann. § 78-31-18· Wash. Rev. Code Ann. § 7.04.180; Wis. Stat. Ann. § 788.13; (West); Wyo. Stat. § 1-36-114

In nine states the time limit prescribed in less than 90 days:

Ala. Code § 6-6-15 (10 days); Ariz. Rev. Stat. Ann. § 12-1506 (10 days); Conn. Gen. Stat. Ann. § 52-420 (West) (30 days); Hawaii Rev. Stat. § 658-11 (10 days); Md. Stat. Ann. CJ § 3-224 (30 days); Mass. Gen. Laws Ann. Ch. 150C § 11 (30 days); Mich. Gen. Court Rules 769 (20 days); Ore. Rev. Stat. § 33.310 (20 days); Vt. Stat. Ann. tit. 21 § 541 (30 days).

Opposition

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-314

IN THE

Supreme Court of the United States

October Term, 1981

RONALD SINE and LARRY DANNER,
Petitioners

v.

MITCHELL TRANSPORT, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. MCALEESE, JR.*
ROGER D. SUSANIN
GERALD T. HATHAWAY
JAMES J. WANKMILLER
CUNNIFF, BRAY & MCALEESE
Suite 240, One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
(215) 667-7080
Attorneys for Respondent

*Counsel of Record for Respondent

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did not the courts below correctly apply the State statute of limitations for vacating arbitration awards in direct accordance with this Court's pronouncements in *United Parcel Service v. Mitchell* and *UAW v. Hoosier Cardinal*?

II. Do not the circuits uniformly and without conflict look to state law in determining the applicable limitations period in actions under Section 301 of the Labor Management Relations Act?

PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were:

1. Ronald Sine and Larry Danner who were appellants below and petitioners to this Court;

2. Mitchell Transport, Inc. which was an appellee below and respondent in this Court;

3. Local 992, International Brotherhood of Teamsters which was an appellee below but not a respondent in this Court;

4. Eastern Conference of Teamsters which was an appellee below but not a respondent in this Court.

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No. 81-314

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RONALD SINE AND LARRY DANNER,
Petitioners

v.

MITCHELL TRANSPORT, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Mitchell Transport, Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit's judgment and opinion entered on March 24, 1981.

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is officially reported at 644 F. 2d 997, and is set forth in the petition for certiorari (App. 56-89). That decision affirmed a judgment of the United States District Court for the District of Maryland, the opinion of which is unpublished, but

which is set forth in the petition for certiorari (App. 90-109).

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on March 24, 1981. A Petition for Rehearing was denied by Order dated May 12, 1981.

This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Annotated Code of Maryland Courts and Judicial Proceedings § 3-224 Vacating Award

(a) *Petition*—(1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

29 U. S. C. § 1

§ 1 "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties bills of lading of water carriers, agreements relating to wharfage supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation,

but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

29 U. S. C. § 12

§ 12 Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the Court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

29 U. S. C. § 185(a)

§ 185 Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

COUNTERSTATEMENT OF THE CASE

In their Statement of the Case, Petitioners only write the most recent chapter of the dispute between the parties, thus necessitating this Counterstatement of the Case. In addition, petitioners' statement contains assertions which can only be characterized as false and misleading.

The instant case is an attempt by two employees ("Sine and Danner") of Mitchell Transport, Inc. ("Mitchell") to vacate a *portion* of a final and binding arbitrator's award rendered in accordance with the grievance procedure set forth in the relevant collective bargaining agreement.

Sine and Danner's claim giving rise to the final and binding arbitration award was an assertion by them in the form of a grievance that Mitchell violated the germane collective bargaining agreement, commonly known as the Eastern Area Cement Haul Agreement ("Agreement"), to which it and Local No. 992, International Brotherhood of Teamsters ("Local 992") were party.

The basis for the instant action is a contention by Sine and Danner that the *portion* of the arbitrator's award which was unfavorable to them must be vacated because Local 992 "unfairly represented" them; that the arbitration decision "does not arise from the essence" of the Agreement; and that the arbitrator was incompetent and rendered a decision "tainted with corruption." Sine and Danner have not attacked nor sought vacation of that *portion* of the award which was favorable to them.

Mitchell is an interstate common carrier and employs Sine and Danner as tractor trailer drivers at its Union Bridge, Maryland, terminal. Sine and Danner have long claimed that Mitchell, in violation of the Agreement, had denied them their proper seniority positions for dispatch purposes. They assert that as a result of being denied the

higher seniority positions they have been harmed in that they have lost earning opportunities.

In support of their claims, Sine and Danner in 1973 filed a civil action against Mitchell and Local 992 in the United States District Court for the District of Maryland, Civil Action 73-724-Y. In that suit, the plaintiffs sought a monetary award, as well as injunctive relief compelling Mitchell to grant them what they contended to be their rightful seniority positions.

On June 6, 1975, the jury awarded Sine and Danner collectively $25,000 in damages. However, the Honorable Joseph H. Young, United States District Judge for the District of Maryland, denied Sine and Danner the injunctive relief they sought, that is the change in their seniority status. Judge Young advised the parties of his decision by letter dated October 29, 1975, wherein he stated:

> . . .
>
> After reviewing the instruction, the evidence, and the pretrial order I find nothing in the jury's verdict that would require or justify the issuance of injunctive relief as requested by the plaintiffs. The actions of the parties are controlled by various union agreements and *those agreements set forth the procedures to be followed in enforcing the rights of all parties.* This enforcement neither requires nor justifies Court intervention based upon the jury's verdict. (Emphasis added)
>
> . . .

Judge Young's formal order denying Sine and Danner the injunctive relief they sought was filed on October 31, 1975. The United States Court of Appeals for the Fourth Circuit on May 14, 1976, specifically denied Sine and Danner's attempted appeal of the District Court's refusal to grant them their requested seniority positions.

Subsequent to the jury's verdict but prior to the time Judge Young denied Sine and Danner the seniority they requested, they had filed two grievances. The first grievance was filed June 30, 1975, and the second on July 30, 1975. Both grievances sought the restoration of what Sine and Danner believed to be their rightful seniority positions and back pay from June 6, 1975, to the date of the grievances. These two grievances were processed and were presented together to the Eastern Area Tank and Cement Haul Joint Committee ("Joint Committee") as case no. 1384.[1]

Case no. 1384 was heard by the Joint Committee on November 19, 1975. This was, of course, subsequent to the decision and Order of Judge Young that such questions should be submitted to contractual procedures. The Joint Committee in decision 1384 specifically denied Sine and Danner's claim for seniority as well as their claim for back pay. This decision of the Joint Committee became a final and binding decision pursuant to the terms of the collective bargaining agreement.

Neither Sine nor Danner ever complained of Local 992's representation of their interests before the Joint Committee in case no. 1384. Furthermore, both Sine and Danner admitted that they never attempted to appeal or vacate decision 1384.

Notwithstanding the denial of Sine and Danner's grievances in case 1384 and the Fourth Circuit Court of Appeals' denial of their appeal for injunctive relief, Sine

1. The Agreement provides for the establishment of the Joint Committee to hear disputes which have not been resolved in the previous two steps of the grievance procedure. The Agreement provides that the Joint Committee shall consist of an equal number of designated representatives of the employers and the unions party to the Agreement. Furthermore, the Agreement provides that the Joint Committee's decisions are final and binding on all parties.

and Danner on April 13, 1977, once again filed a grievance identical to that filed in 1384. This re-filed grievance was designated as case no. 1524. In this grievance, they *again* sought seniority elevation and back pay from June 6, 1975, to the date of the grievance. Both Sine and Danner admitted in their respective depositions that the claims they advanced in case no. 1524 and the basis for them were identical to their claims in case no. 1384.

Sine and Danner's April 13, 1977 grievance was heard by the Joint Committee as case no. 1524 on May 24, 1977. At the hearing, Sine and Danner presented no substantive facts to the Joint Committee which were not presented in case no. 1384. However, Sine and Danner read a letter to the Joint Committee dated May 20, 1977, written by their private attorney, Harry Goldman, Jr., Esquire, to Thomas H. Kohn, Esquire, the Conference [2] attorney who assisted Sine and Danner and Local 992 in their preparation for cases nos. 1384 and 1524. The subject letter threatened all panel members of the Joint Committee with a law suit unless the union representatives on the Committee "deadlocked" the case.

Notwithstanding the fact that the Joint Committee denied Sine and Danner's identical claims in case no. 1384, the Joint Committee (with the equal number of union and employer representatives) thus deadlocked case no. 1524. Both Sine and Danner admitted in their depositions that they believed the crucial reason for the turnabout by the Joint Committee was Mr. Goldman's "threatening letter" to the union members of the panel.

As a result of the deadlock, Mitchell and Local 992, pursuant to the Agreement, utilized the services of the

2. The third defendant not heretofore identified is the Eastern Conference of Teamsters ("Conference"). The Conference was named as a party to the action by Sine and Danner notwithstanding the fact that the Conference is not party to the Agreement and thus owed Sine and Danner no duty of fair representation.

Federal Mediation and Conciliation Service to select an arbitrator. Arbitrator Jay Kramer, Esquire, a nationally known arbitrator, was selected on or about June 17, 1977 as the arbitrator.

An arbitration hearing on case no. 1524 was held on October 3, 1977. Sine and Danner and Local 992 were represented at the hearing by Thomas H. Kohn, Esquire, a Conference attorney who was retained by Local 992 to present the case to Arbitrator Kramer. A court reporter was present at the arbitration hearing and made a transcript of the proceedings. Both Local 992 and Mitchell submitted a large number of exhibits including the complete three volume transcript of Civil Action 73-724-Y. Both counsel for Local 992 and counsel for Mitchell submitted post hearing briefs. Having this voluminous record before him, Arbitrator Kramer issued his decision on August 22, 1978, wherein he denied the plaintiffs' back pay claim and granted them *in futura* their requested seniority change *based upon an intervening negotiated change in the relevant provisions of the Agreement.* Sine and Danner both received copies of Arbitrator Kramer's award prior to September 1, 1978, as did their private attorney, Harry Goldman, Jr., Esquire.

Sine and Danner filed the instant action with the District Court for the District of Maryland on November 20, 1978, seeking to vacate only that portion of the arbitration award which was unfavorable to them.

Sine and Danner assert in their complaint that the action is brought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185(a), and under the provisions of the Federal Arbitration Act, 9 U. S. C. § 1. At no time prior to the petition for certiorari have Sine and Danner ever relied upon Section 10(b) of the LMRA, 29 U. S. C. 160(b) or the New York statute of limitations.

The District Court denied Sine and Danner's claim and granted summary judgment for all defendants finding that the applicable statute of limitations had run on the decision no. 1524. As such, it did not even reach the statute of limitations question on the decision in case no. 1384, which had decided the identical seniority question *36 months* before the instant complaint had been filed. Specifically, the District Court rejected the application of the United States Arbitration Act and looked to the Maryland Uniform Arbitration Act's time limitations period when it considered the timeliness of Sine and Danner's claim. The District Court did not consider, nor was it urged upon the Court by Sine and Danner, that the six-month time limit governing NLRB proceedings, 29 U. S. C. § 160(b), or the New York statute of limitations, had any bearing on the outcome of the case.

The Court of Appeals affirmed the District Court on the basis of the relevant statute of limitations. That Court likewise was not asked to consider the relevance of Section 10(b) of the LMRA or the New York statute of limitations.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Case Below Was Considered and Decided in Accordance With Established Supreme Court Authority and Does Not Require Review or Enunciation by This Court.

The instant petitioners come before this Court seeking review of the decision of the Fourth Circuit Court of Appeals denying their claim to vacate an arbitrator's award as being barred by the applicable state statute of limitations. This ruling, however, was grounded in established decisions of this Court and, therefore, should be left undisturbed.

The petitioners, Sine and Danner, instituted the present action on November 20, 1978, by filing a complaint in the District Court for the District of Maryland seeking to vacate the August 22, 1978 decision of Arbitrator Jay Kramer, insofar as it denied petitioners an award of back pay against respondent, Mitchell Transport, Inc. The complaint was brought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185 (a), and under the provisions of the United States Arbitration Act ("the Act"), 9 U. S. C. § 1 *et seq.* As correctly decided by the Court of Appeals below, however, the United States Arbitration Act by its own provisions does not apply to contracts of employment of workers engaged in interstate commerce, 9 U. S. C. § 1. For that reason, the three-month limitations period for instituting suits to vacate arbitration awards contained in Section 12 of the Act was held inapplicable to the present action. Since Mitchell is an interstate carrier, the United States Arbitration Act was of no relevance. This being the case, it was clear that jurisdiction of the instant action could only be based on Section 301 of the LMRA.

The LMRA does not contain an express time limitation on the bringing of a Section 301 action. Therefore,

this Court has mandated that the timeliness of a Section 301 action is to be determined, as a matter of federal common law [3], by reference to the appropriate State statute of limitations. *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U. S. 696 (1966). As stated by the Court of Appeals below:

> In this case, Congress has not provided for a limitations' period for actions under § 301 to vacate an arbitration award, and has specifically excluded the application of the United States Arbitration Act to actions concerning such collective bargaining agreements. Thus, given that Congress has not provided otherwise, we look to the law of Maryland to determine the appropriate limitations' period. (App. 78-79).

Recently, this Court has ruled that where a labor dispute has proceeded through arbitration pursuant to grievance resolution procedures established in a collective bargaining agreement, the appropriate time limitations period to an action seeking to challenge the finality of that arbitration award on the basis of a Section 301 violation, is the state statutory period for vacation of arbitration awards. *United Parcel Service, Inc. v. Mitchell, et al.*, 49 U. S. L. W. 4378 (April 21, 1981). Since the instant action, as in *Mitchell*, was clearly one to vacate an arbitrator's award, the applicable time limitation was correctly found within the Maryland Uniform Arbitration Act. See also, *Barbarino v. Anchor Motor Freight*, 421 F. Supp. 1003 (W. D. NY, 1976).

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3. This Court held in *Campbell v. City of Haverhill*, 155 U. S. 610 (1895), that in determining which statute of limitations to apply, federal courts are to consider the laws of the states, except *where Acts of Congress* otherwise require. See 28 U. S. C. § 1652, Rules of Decision Act.

Section 3-224 of the Maryland Uniform Arbitration Act provides, *inter alia*, as follows:

> Section 3-224 Vacating award.
>
> (A) Petition—(1) Except as provided in paragraph (2), a petition filed to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

This provision operates to limit the period for vacation of an arbitration award in Maryland to 30 days, and was appropriate to apply in limiting the ability of the petitioners to bring an action under Section 301. Because the instant action was filed on November 20, 1978, clearly more than 30 days after they (and their attorney) had received the August 22, 1978 award, it was properly dismissed as untimely under subparagraph (a)(1) of Section 3-224 of the Maryland Uniform Arbitration Act. Accordingly, the Court of Appeals decision, which was based on controlling Supreme Court authority in *Hoosier* and *Mitchell*, should not be disturbed.

2. The Decision Below Is Not in Direct Conflict With Decisions of Other Courts of Appeal.

Contrary to the petitioners' contention, there is no conflict among circuits regarding the applicability of the United States Arbitration Act to Section 301 actions which calls for the exercise of this Court's discretionary jurisdiction. The allegedly conflicting decisions cited by the petitioners are distinguishable from the case now before the Court and do not, therefore, constitute direct and meaningful conflict among the decisions of the Courts of Appeals.

For example, the Sixth Circuit, in *Hoover Motor Express v. Teamsters Local 3327*, 217 F. 2d 49 (6th Cir. 1954), was called upon to consider a situation, totally

unlike the instant case, in which the defendant-union in a Section 301 action filed a motion under *Section 3* of the United States Arbitration Act requesting an order to stay the action until arbitration proceedings were conducted. The plaintiff-employer argued that the disputed contract was a "contract of employment" subject to the exclusion of Section 1 of the Act. The Sixth Circuit, however, labelled the disputed contract a trade agreement rather than a "contract of employment" and held Section 3 to be applicable. The applicability of the United States Arbitration Act's Section 12 statute of limitations to Section 301 actions was never even considered by the Court.

The Seventh Circuit, in *Chauffeurs, Teamsters, Etc. v. Jefferson Trucking Co.*, 628 F. 2d 1023, 1026 (6th Cir. 1980), similarly did not determine Section 12 of the United States Arbitration Act to be applicable to Section 301 actions. In fact, the Court clearly held otherwise in reliance upon this Court's pronouncements in *Hoosier*.

> We therefore conclude that subject matter jurisdiction in this case was proper under Section 301 of the LMRA. The LMRA, however, does not provide for a time limitation on actions to vacate an arbitration award in a suit to enforce the award under Section 301. Accordingly, the timeliness of a Section 301 suit is to be determined, as a matter of federal law, "by reference to the appropriate state statute of limitations." *UAW v. Hoosier Cardinal Corp.*, 383 U. S. 696 (1966).

The Seventh Circuit, thereafter, correctly deferred to the applicable provision of the Indiana Code for confirmation of an arbitration award.

The First Circuit in *Local 205 v. General Electric Co.*, 233 F. 2d 85 (1st Cir. 1956), like the Sixth Circuit in *Hoover, supra*, was presented with an entirely different

issue than the one presented to the Court of Appeals below. In *Local 205*, the Court was faced with the question whether a federal district court, in the context of a Section 301 action, has the authority to compel the arbitration of a dispute in accordance with the terms of a collective bargaining agreement. The Court, indicating a strong preference for arbitration, compelled arbitration pursuant to *Section 2* of the United States Arbitration Act reasoning that a collective bargaining agreement was not a "contract of employment" subject to the Section 1 exclusion. The Court, however, never examined the applicability of the Section 12 statute of limitations to Section 301 actions.

The petitioners have also relied on a number of district court cases which, upon closer inspection, are equally refutable.[4] The single case cited by the petitioners which presents a possible conflict, however, is *Communications Workers of America v. Pacific Tel. & Tel.*, 462 F. Supp. 736 (1978), a California district court case. It is submitted nonetheless, that notwithstanding this conflict, this

4. In *International Union v. Kerr-McGhee*, 618 F. 2d 657 (10th Cir. 1978), the majority explicitly relied on *Hoosier* in applying the State statute of limitations. In *Pizzuto v. Hall's Motor Transit Co.*, 409 F. Supp. 427 (E. D. Va., 1967), the court held at 429, the "United States Arbitration Act does not apply to the arbitration clause in the collective bargaining contract in question." In *DeLorto v. UPS*, 401 F. Supp. 408 (D. Mass., 1975), the Court relied on *Hoosier* in applying the state 30-day statute of limitations in a claim for relief pursuant to Section 301. In *UAW v. LaGrosse Coller Corp.*, 406 F. Supp. 1213 (W. D. Wisc., 1976), the Section 1 exclusion of the United States Arbitration Act was held inapplicable because the employees were not "engaged in interstate commerce". In *Teamsters v. Ruan Transportation Co.*, 473 F. Supp. 298 (N. D. Ind., 1978), the issue ruled on by the court, in contrast to the present action, was whether a statute of limitations is applicable to affirmative defenses to an action brought by a union seeking to have a grievance award confirmed.

Court should not grant a petition for certiorari to review a decision of a Court of Appeals merely because it runs counter to a decision rendered by a district court from another circuit. This is especially true where the district court decision itself is in direct conflict with a pronouncement of this Court. The district court in *Pacific Tel.* chose to adopt a federal time limitation in Section 301 actions despite the fact that this Court, presented with a similar request in *Hoosier,* elected not to embark on "so bald a form of judicial innovation" finding "no justification for the drastic sort of judicial legislation that is urged upon us." 383 U. S. 696, 701, 703.

It is the duty of the Courts of Appeals, not the Supreme Court, to maintain uniformity within their circuits and to supervise the decision of the district courts. For that reason, and because the Circuits uniformly and without conflict look to state law in determining the applicable limitations' periods in Section 301 claims, this Court should deny certiorari.

3. Neither the District Court Nor the Court of Appeals Below Passed on the Issue of Whether the Limitations Period for Bringing Section 301 Actions Should Be Borrowed From the NLRA or the New York Statute Concerning Vacation of Awards.

Nowhere in the petitioners' complaint to the District Court nor in their appeal to the Fourth Circuit Court of Appeals, have the petitioners previously asserted the applicability of the NLRA six-month limitations period (§ 10b) or the 90-day New York statute of limitations. These issues, therefore, were not passed on by either court and, it is submitted, should not now be considered by this Court on certiorari.

It is well-established that issues not pleaded in a complaint, nor considered by the district court or the court

of appeals, are not properly before the Court on petition for certiorari. *Bell v. Wolfish*, 441 U. S. 520 (1979); *Tennessee v. Dunlap*, 426 U. S. 312 (1976); *Rugendorf v. United States*, 376 U. S. 528 (1964); *Lawn v. United States*, 355 U. S. 339 (1958); *United States v. Fleischman*, 339 U. S. 349 (1950). This Court sits as a court of review, and accordingly, questions not presented or passed upon below are *not* appropriate for the exercise of the Court's discretionary jurisdiction. The record herein, or rather lack thereof, clearly does not provide a sound basis for review or resolution of the petitioners' newly-asserted contentions. For this reason alone, the petition before the Court should be denied.

4. A Granting of the Requested Relief Would Undermine the Arbitral Process and Would Be Contrary to the Established Federal Labor Policy of Favoring Quick and Final Resolution of Disputes.

By deciding that the Maryland statute of limitations barred the petitioners' claim to vacate the arbitrator's award, it was not necessary for the District Court and the Court of Appeals to consider Mitchell's contention that the grievance which resulted in the arbitrator's award was never arbitrable because of previous Joint Committee decision no. 1384. However, it is submitted that if this Court were to grant the petitioners' requested relief, the courts below would nonetheless decide the case on principles of *res judicata*, thereby rendering moot the granted relief.

As has been detailed in the statement of facts, after the jury verdict was entered on June 6, 1975, the petitioners filed two additional grievances against Mitchell seeking seniority advancement and back pay. These grievances were processed in accordance with the directive of

Judge Young under the collective bargaining agreement's grievance procedure, and were brought to the Joint Committee as Case No. 1384. The Joint Committee subsequently denied the petitioners' seniority claims in decision 1384.

It is clear that under federal law a Joint Committee's determination pursuant to a contractual grievance procedure has the same final and binding effect as an award rendered by a labor arbitrator. *General Drivers, Warehousemen & Helpers Local Union 89 v. Riss & Co.*, 372 U. S. 517 (1963). Unless the union successfully petitions a federal district court to vacate the decision (see *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960)), or the grievants demonstrate that their union's breach of its duty of fair representation contributed to an erroneous determination (see *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976)), the Joint Committee's decision must stand. Since neither the union nor the petitioners brought such actions, decision no. 1384 rendered by the Joint Committee constituted a "final and binding arbitration award" in November of 1975.

The grievance which led to the arbitration award below, sought the *identical* relief as in Case No. 1384. It was based upon the *same claim* and the *same operative facts* which the petitioners advanced before the Joint Committee in 1975. The merits of Case No. 1384 should not have been relitigated in the subsequent grievance. *Riss, supra; Enterprise Wheel, supra.* Notwithstanding this argument, Arbitrator Kramer considered the case and made an award.

It is submitted that the courts below, faced with the petitioners' action to vacate the award, would bar such a request as violative of the principles of collateral estoppel and *res judicata*. A portion of the District Court's opinion is particularly revealing:

> If ever a case were litigated beyond the point of all practical utility, this case constitutes a prime example. In denying plaintiffs' request for injunctive relief over four years ago, this Court clearly indicated that the monetary damages awarded by the jury were to constitute the exclusive remedy obtained from this forum. Now, having had several additional bites at the same apple by filing grievances subsequent to the jury's award, plaintiffs seek to present their case before this Court yet again. While noting plaintiff's dogged perseverance, this Court has a duty both to litigants and society to bring litigation to a halt when enough is too much. (citations omitted) (App. 98-99).

The tortured litigative history of this action alluded to by the District Court amply illustrates how the petitioners themselves have violated the federal labor policy favoring the quick and final resolution of disputes (See *Steelworkers v. Amer. Mfg. Co.*, 363 U. S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp., supra,* collectively referred to as the "Steelworkers Trilogy") and provides yet another reason why certiorari should be denied.

CONCLUSION

Because this Court's pronouncements in *Mitchell* and *Hoosier* correctly dictated the decision of the Court of Appeals below and, because there is no direct and meaningful conflict among the circuits, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. MCALEESE, JR.
ROGER D. SUSANIN
GERALD T. HATHAWAY
JAMES J. WANKMILLER
CUNNIFF, BRAY & MCALEESE
Suite 240, One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
(215) 667-7080
Attorneys for Respondent